

No. 43589-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

THAI V. NGUYEN

Appellant,

On Appeal from the Pierce County Superior Court
Cause Nos. 10-3-01944-7, 07-5-00046-8, 11-3-02842-8
The Honorable Frank E. Cuthbertson, Judge

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion in finding Nguyen failed to prove due diligence when Nguyen did not produce any evidence of due diligence?
(Assignments of Error 1,2,3)
2. Whether the trial court abused its discretion in finding that Nguyen had the ability to comply with his child support orders based on evidence that seven different doctors over a two year period had determined, eleven times, that Nguyen was capable of working?
(Assignments of Error 1,2,3)
3. Whether the trial court abused its discretion in relying on the medical findings of those seven doctors instead of the inconsistent and incredible testimony of Nguyen?
(Assignments of Error 1,2,3)

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Under cause number 07-5-00046-8, the State filed three documents on June 1, 2010: (1) a Motion and Declaration for an Order to Show Cause Re: Contempt which referenced the underlying Order of Child Support dated 6/26/07, (2) a Document Cover Sheet along with

the attached debt calculation, case payment history, and employment security data, and (3) the Order to Show Cause Re: Contempt. CP ____, ____, ____.¹

Under cause number 10-3-01944-7, the State filed a Petition to Enforce Support on June 1, 2010, which included the underlying Administrative Order of Child Support dated 10/17/08. CP 19-34. Then on June 8, 2010, the State filed three more documents: (1) a Motion and Declaration for an Order to Show Cause Re: Contempt, (2) a Document Cover Sheet along with the attached debt calculation, case payment history, and employment security data, and (3) the Order to Show Cause Re: Contempt. CP 246-47, ____, _____. On December 28, 2011, the State filed four more documents: (1) an Amended Petition to Enforce Support which referenced the 10/17/08 Administrative Order and a new Administrative Order dated 10/25/11 for the most recent child born, Jason,² (2) a Motion and Declaration for an Order to Show Cause for both administrative orders, (3) a Document Cover Sheet along with the attached debt calculation, case payment history, and employment security data, and (4) the Order to Show Cause Re: Contempt. CP 248-

¹ The State has designated these orders as Clerk's Papers and they are cited accordingly for completeness and clarity, even though portions of some orders were attached as exhibits to Nguyen's Brief on Motion for Revision which has also been designated in its entirety.

² Jason was born July 2011 while the show cause hearing was pending. CP 249.

275, 276-77, ____, ____.

Under cause number 11-3-02842-8, the State filed three documents on July 29, 2011: (1) a Motion and Declaration for an Order to Show Cause Re: Contempt which referenced the underlying Administrative Order of Child Support dated 4/23/10, (2) a Document Cover Sheet along with the attached debt calculation, case payment history, and employment security data, and (3) the Order to Show Cause Re: Contempt. CP ____, ____, ____.

On April 27, 2012, the three cases were consolidated for hearing and Commissioner Robyn Lindsay found Nguyen in contempt, finding that he had failed to meet his burden of proving he had exercised due diligence in trying to comply with the support orders. RP 4/27/12, pages 26-27; CP 25-39, ____, ____.

Nguyen sought revision and on May 25, 2012, all three cases were consolidated for hearing. CP 180-81, ____, ____ Judge Frank E. Cuthbertson also found Nguyen had failed to meet his burden of proving he had exercised due diligence in trying to comply with the support orders and he denied the motion to revise Commissioner Lindsay's April 27, 2012 orders. RP 5/25/12, page 26; CP 178-79, ____, ____.

Nguyen then sought review by this Court.

B. SUBSTANTIVE FACTS

Seven different doctors examined Nguyen between March 2009 and May 2011 and, on eleven different occasions, determined that Nguyen was medically capable of returning to work. CP 200, 202, 205, 207, 209, 217, 222, 224, 231, 240, 241. These doctors included one of Nguyen's own treating physicians, Thu V. Le, M.D. CP 202, 209. These doctors relied on comprehensive examinations. CP 196-97, 199-200, 204-05, 211-19, 226-33, 235-42, 244-45. As early as July 20, 2009, David Smith, MD, after a thorough physical examination of Nguyen, found "he can go back to his usual work without formal restrictions as there are no clear objective findings today warranting such restrictions." Dr. Smith noted Nguyen's physical condition was "quite normal". CP 217-18.

Nguyen was found capable of returning to work several times over the ensuing months and on January 18, 2011, Mark Koenen, MD conducted a comprehensive psychological evaluation of Nguyen. Dr. Koenen found "there are no significant restrictions to the claimant returning to work. He should return to work as soon as possible as this would likely do a great deal to relieve his financial stressors and improve his mood." CP 231. Notably, he theorized that the pain Nguyen claimed to experience might be a reflection of his mental stress rather than have

a physical basis. CP 231.

Similarly, in their January 18, 2011 report, Edward DeVita, MD and Colm O’Riordan, MD stated, “We note no objective basis for any work restrictions.” CP 240. Even after reviewing a third MRI dated March 5, 2011, Dr. DeVita found no evidence to change his conclusion. CP 245.

Nguyen testified briefly at the April 27, 2012 show cause hearing, but he mentioned no efforts to comply with the orders for child support. RP 4/27/12, pages 18–19, 22–25. Although Nguyen’s testimony suggested he did not have to speak or understand English at work, that is the opposite of what he had told a doctor. RP 4/27/12 pages 22– 23; CP 212.

Commissioner Lindsay found Nguyen did not credibly meet his burden of proving due diligence and Judge Cuthbertson agreed. RP 4/27/12, pages 26–27; RP 5/25/12, page 26; CP 36, ____, ____.

111. ARGUMENT AND AUTHORITIES

The standard of review for a finding of contempt is whether the court abused its discretion. “Whether contempt is warranted in a particular case is a matter within the sound discretion of the trial court; unless that discretion is abused, it should not be disturbed on appeal.” Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995) (citing In re King, 110 Wn.2d 793, 798, 756 P.2d 1303 (1988)). An abuse of

discretion occurs only when it is clearly shown that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Moreman, 126 Wn.2d at 40 (citations omitted).

When a party brings a motion for an order to show cause regarding contempt of a child support order, the burden is on the moving party to make a prima facie case for contempt. RCW 7.21.030, RCW 26.18.050. The State filed motions for orders to show cause, along with supporting documentation that lawful support orders existed and that Nguyen had failed to make more than one payment in the preceding one to two years, and the court issued orders to show cause accordingly. CP ____, ____, ____. Nguyen did not challenge these orders nor the evidence that he failed to make payments.

The law presumes that one is capable of complying with child support orders, so any claimed inability to comply is an affirmative defense; the burden of producing evidence and persuading the trier of fact are on the respondent. Moreman, 126 Wn.2d at 40–41 (citing King, 110 Wn.2d at 804)); RCW 26.18.050(4). In meeting this burden, the respondent must produce evidence “of a kind the court finds credible.” Moreman, 126 Wn.2d at 40–41 (citing King, 110 Wn.2d at 804)). Credibility determinations are made by the trier of fact and are not

subject to appellate review. In re Didier, 134 Wn. App. 490, 497, 140 P.3d 607 (2006) (citing Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003)).

Commissioner Lindsay found, and Judge Cuthbertson agreed, that Nguyen had failed to meet his burden of production and persuasion. Commissioner Lindsay found that Nguyen intentionally failed to comply with a lawful court order, that the order related to child support, that he violated the order by failing to pay as ordered, that he had the past ability to comply with the order, that he had income or the ability to earn income but did not pay, that he had the present ability to comply, and that he was not unemployable. Her findings were based on medical records and testimony. RP 4/27/12, pages 26-27; CP 36, __, __. With two exceptions, Nguyen did not challenge these findings and they are therefore verities on appeal. Moreman, 126 Wn.2d at 39 (citations omitted); RAP 10.3(g) ("a separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number"). Nguyen challenged only the findings that he intentionally failed to comply and that he had the present ability to comply. Challenging those findings however, does not substitute for meeting his burden of production and persuasion in the trial court. He did not meet that burden.

The most notable thing about Nguyen's evidence is the lack of it. Nguyen testified briefly at the April 27, 2012 show cause hearing, but he did not describe any due diligence – any efforts to comply with the support orders. Under Washington's child support enforcement statute, the obligor claiming an inability to comply must prove that he "exercised due diligence in seeking employment, in conserving assets, or otherwise in rendering himself or herself able to comply with the court's order." RCW 26.18.050(4). Due diligence is defined as "[s]uch a measure of prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances." Black's Law Dictionary 457 (6th Ed. 1990).

Instead of showing due diligence, Nguyen tried to change the subject. The show cause hearings were continued from September 2010 through April 27, 2012 to allow the respondent to meet his burden. CP 169. Yet, instead of coming forward with evidence of due diligence, Nguyen tried to shift the issue to whether he was "employable". The purpose of making this shift is clear: for three years he had not tried to find a job or, to use his term, to do anything to make himself "employable". He had not exercised due diligence to become employed, whether by becoming more fluent in English, improving his physical condition, or just looking for a job. He produced no evidence

whatsoever that he tried any of those things. RP 4/27/12, pages 18–19, 22–25. His attorney conceded as much. 4/27/12, pages 21–22.

While it is true that a court should consider the respondent's particular situation, the court must do so through the lens of "prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man" in that situation. The question before the court was whether "a reasonable and prudent man" who has three children to support, and who is facing the threat of indeterminate incarceration if he fails to support those children, would not search for work, would not seek additional medical treatment, would not make concerted effort to better learn the language of the country he has lived in since 1991, would conceive a fourth child he would also have to support, and would not even file a tax return for his last year of employment. Viewed through the proper objective lens, the answer is clearly no, a reasonable and prudent man would not do nothing but gamble on a Labor and Industries settlement as the only means of supporting his children.

While the respondent argues the totality of his circumstances makes him unemployable and, impliedly, beyond any requirement of due diligence, it is clear that most of the factors he claims make him unemployable did not limit his employability prior to 2009. The

respondent testified he had worked another job before he began working at Boeing subcontractor Leonard's Metals, he had worked at Leonard's "one year, two months", and at Leonard's "everybody speaks English there." RP 4/27/12, pages 22–23. Commissioner Lindsay noted "a bit of a language barrier" in speaking with Nguyen, but clearly did not agree with his attorney's argument that he was unable to effectively communicate in English. RP 4/27/12, page 26. Nguyen disparages the commissioner's finding in his opening brief, but Commissioner Lindsay's finding is mirrored by the observations of the doctors who examined him. CP 212 (third paragraph), 230. He had been working despite any language, cultural or psychological issues he may have had. Clearly, most of the factors says make him "unemployable" did not prevent him from working in the past and would not do so in the present. That leaves only his argument that his physical condition changed him from fully employed to, as he claims, "unemployable".

However, from 2009 to 2011, seven doctors determined that Nguyen was medically capable of returning to work. CP 200, 202, 205, 207, 209, 217, 222, 224, 231, 240, 241. These doctors relied on comprehensive physical, psychological, and scientific examinations, including MRI and CT scans. CP 196–97, 199–200, 204–05, 211–19, 226–33, 235–42, 244–45. For example, in 2009, only a few months

after Nguyen's job site injury, Dr. Smith found Nguyen could "go back to his usual work without formal restrictions" as Nguyen's objective physical condition was "quite normal," and Dr. Koenen found there were "no significant restrictions to [Nguyen] returning to work." CP 217-18, 231. Almost two years later, Drs. DeVita and O'Riordan agreed, still finding "no objective basis for any work restrictions." CP 240. Nguyen could not refute the credibility of these repeated medical findings and the court below appropriately relied upon them.

In contrast, most of what Nguyen asked the court to consider on his behalf was simply the unsworn statements of his attorney. RP 4/27/12, pages 15-17, 20-22. He did produce some documents at the show cause hearing, but they were not marked as exhibits nor were they preserved for the record. RP 4/27/12, pages 2-8.

Nguyen testified, but his testimony was not only inadequate, it was not credible. He testified only that his pain interfered with him looking for similar work. RP 4/27/12, page 18. He mentioned no efforts to comply with the orders for child support. RP 4/27/12, pages 18-19, 22-25. Although Nguyen's testimony suggested he did not have to speak or understand English at work, that is the opposite of what he previously told a doctor. RP 4/27/12 pages 22-23; CP 212. Additionally, he had falsely told a doctor that he was paying child

support. CP 229.

Ultimately, both Commissioner Lindsay and Judge Cuthbertson found that Nguyen failed to meet his burden of production and persuasion. As Judge Cuthbertson noted during the motion for revision, “That’s the legal question that was before the commissioner below: Did he exercise due diligence... and it... sounds like what you’re saying today is, well, he really didn’t and there’s nothing in the record to show that he did.” RP 5/25/12, page 17.

Given the lack of credible evidence showing that he was unable, through due diligence, to comply with the underlying support orders, it is not possible to say that the court below exercised its discretion in a manner that was “manifestly unreasonable, based on untenable grounds, or based on untenable reasons”. This is especially true in light of the overwhelming evidence that Nguyen was capable of working.

An abuse of discretion occurs only when it is clearly shown that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Commissioner Lindsay found Nguyen did not credibly meet his burden of proving he was unable to comply with the support orders, or that had exercised due diligence in trying to comply, especially in light of the substantial medical evidence that he was capable of working. RP 4/27/12, pages

26–27. Judge Cuthbertson also found Nguyen had not met his burden of proof because he had presented no credible evidence of due diligence. RP 5/25/12, page 26. Commissioner Lindsay and Judge Cuthbertson were well within the exercise of their discretion in finding that Nguyen failed to meet his burden under Moreman. The Court should affirm the Superior Court findings and the contempt orders entered April 27, 2012.

IV. MATTERS OUTSIDE THE RECORD

Nguyen has designated Clerk’s Papers and a Report of Proceedings from a May 16, 2012 review hearing. RP 5/16/12 1–17, CP 1–18. These are cited by Nguyen at pages four (4), seven (7) and twelve (12) of his brief, but Nguyen has not assigned error to, nor otherwise appealed, the decisions or proceedings from the May 16, 2012 hearing.

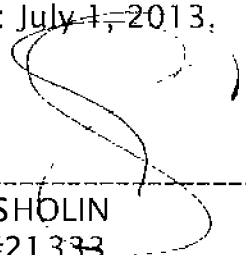
Instead, Nguyen seems to be citing matters from that hearing to support his claim that he met his burden at the April 27, 2012 show cause hearing. Of course it is impossible that he met his burden before Commissioner Lindsay on April 27, 2012 by relying on documents and testimony presented two weeks later to a different judicial officer. Further, these records could not have been properly considered by Judge Cuthbertson on the motion for revision as that proceeding was limited to the evidence presented to Commissioner Lindsay. In a motion to revise,

the reviewing court sits in the position of the original court, considering all of the same evidence and applying the same legal standards. State v. Ramer, 151 Wn.2d 106, 113, 86 P.3d 132 (2004); In re Marriage of Moody, 137 Wn.2d 979, 992–93, 976 P.2d 1240 (1999); In re Marriage of Dodd, 120 Wn. App. 638, 644, 86 P.3d 801 (2004). The Report of Proceedings and Clerk's Papers from the May 16, 2012 hearing should be disregarded as not properly before this Court. Similarly, he has designated as Clerk's Papers orders filed in June and July 2012, but he has not appealed, cited nor argued them. CP 182–84, 187–89. These should also be disregarded as outside the scope of the matter appealed.

V. CONCLUSION

Nguyen has not shown that Judge Cuthbertson abused his discretion in finding that Nguyen failed to produce any evidence of due diligence. The Court should affirm Judge Cuthbertson's denial of revision and let the contempt orders issued April 27, 2012 stand.

DATED: July 1, 2013,



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